

HUMAN SERVICES

DIVISION OF MENTAL HEALTH SERVICES

Partial Care Services Standards

Proposed Amendment: N.J.A.C. 10:37F-2.4

Authorized By: Jennifer Velez, Commissioner, Department of Human Services

Authority: N.J.S.A. 30:9A-10.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2008 – 143

Submit written comments by July 4, 2008 to:

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The agency proposal follows:

The Department of Human Services (Department), in conjunction with the Division of Mental Health Services (Division), is proposing an amendment to N.J.A.C. 10:37F, Partial Care Services Standards.

The Department is providing a 60-day public comment period for this proposal. Therefore, pursuant to N.J.A.C. 1:30-3.3(a)5, this proposal is not

subject to the provisions of N.J.A.C. 1:30-3.1 and 3.2, governing rulemaking calendars.

Partial care services are individualized, outcome-oriented mental health services, which provide comprehensive, structured, non-residential, interdisciplinary treatment and psychiatric rehabilitation in a community setting to assist individuals with severe mental illness in increasing or maximizing independence and community living skills and enhancing the quality of their lives. Partial care services are offered to individuals ages 18 years or older with a primary psychiatric disorder that is accompanied by an impaired ability to perform living, learning, working, or social roles. The purpose of partial care services is to achieve community integration through these roles and to prevent relapse and more intensive acute interventions, such as hospitalizations.

#### Background

N.J.A.C. 10:37F was most recently readopted with amendments on November 6, 2006 (38 N.J.R. 4694(b)). The notice of proposal (dated May 15, 2006 at 38 N.J.R. 1990(a)) included the following new language, regarding family participation in the development of the consumer's individualized recovery plan: "To assure family participation in developing the IRP and revisions, the PA shall seek the input of family members at each service planning milestone, provided that the consumer has given written consent to release information related to the treatment of his or her mental illness;" (N.J.A.C. 10:37F-2.4(b)4).

During the ensuing 60-day public comment period, the issue of the scope of, and conditions permitting the disclosure of, confidential, treatment-related

information to a consumer's family members received much attention. While some commenters felt that involving family members in the recovery planning process was "unnecessarily burdensome," others wanted the requirement to be strengthened and expanded. In the notice of adoption, the Department maintained that involving families during at appropriate planning milestones was a benefit, rather than a burden, but noted that it was unable to adopt substantive changes that were not subject to public comment, because of rulemaking requirements. (Where an agency determines to make changes to a proposed rule that are "so substantial as to effectively destroy the value of the original notice," the agency must give a new notice of proposal and public opportunity to be heard. N.J.A.C. 1:30-6.3(a).) However, the Department represented that it would consider the issue in future regulatory revisions. Thus, upon readoption, N.J.A.C. 10:37F-2.4(b)4 read as originally proposed.

#### Proposed Amendments

The Department believes that the amendments proposed herein at N.J.A.C. 10:37F-2.4(b)4 reflect a synthesis of both State and Federal law. Further, in allowing, under certain conditions, disclosure of protected health information to family members and close friends, the amended provision balances consumers' rights to confidentiality and autonomy in their recovery, while making possible the contributions and support of families and significant others in these efforts.

This rulemaking proposes to amend N.J.A.C. 10:37F-2.4(b)4 in the following manner. As adopted last November, family participation in developing the Individualized Recovery Plan (IRP) was conditioned only upon the consumer giving written consent to release information relevant to the treatment of his or her mental illness. In addition to adding “close personal friends” as among those who may be included at each recovery planning milestone, the amendments herein delineate specific circumstances, in addition to written consent, under which protected health information may be disclosed.

First, the proposed amendments provide that a valid written authorization will permit such disclosure (N.J.A.C. 10:37F-2.4(b)4i). Second, in the absence of written authorization and where the consumer is present at the planning milestone or was available prior to, disclosure can occur if the disclosed information is directly relevant to the family member’s or close personal friend’s involvement with the consumer’s care and one of the following conditions is present: (1) the consumer agrees to the disclosure at the time of the planning milestone (N.J.A.C. 10:37F-2.4(b)4ii(1)); (2) the consumer is provided with an opportunity to object to the disclosure at the planning milestone and does not express an objection (N.J.A.C. 10:37F-2.4(b)4ii.(2)); or (3) based on the exercise of professional judgment, the provider reasonably infers from the circumstances at the planning milestone that the consumer does not object to the disclosure (N.J.A.C. 10:37F-2.4(b)4ii(3)). Unless circumstances suggest otherwise, the consumer’s agreement to participate in the planning milestone with the family member or close personal friend present indicates that the consumer does not

object to disclosure of protected health information that is directly relevant to the family member's or close personal friend's involvement with his or her care (N.J.A.C. 10:37G-2.4(b)4ii(3)).

The proposed amendments address a third scenario – that is, where the opportunity to agree or object to the disclosure cannot be practicably provided because of the individual's incapacity or an emergency circumstance (N.J.A.C. 10:37F-2.4(b)4iii). In this case, the provider may exercise professional judgment to determine whether the disclosure is in the best interests of the individual and, if so, disclose only the protected health information that is directly relevant to the person's involvement with the individual's health care.

Where disclosure occurs under N.J.A.C. 10:37F-2.4(b)4ii or iii (that is, in the absence of valid written authorization), the provider is required to document the basis for such (N.J.A.C. 10:37F-2.4(c)). Disclosure under N.J.A.C. 10:37F-2.4(b)4ii or iii shall not authorize or otherwise provide a basis for future disclosures not in compliance with the section.

The proposed language is consistent with State law (N.J.S.A. 30:4-24.3) and closely mirrors the regulations implementing the Health Information Portability and Accessibility Act (HIPAA) - specifically, 45 CFR 164.510(b). State confidentiality law requires that where consent is lacking, disclosure must be limited to relatives, friends, personal physician or attorney and the information must be used directly or indirectly for the patient's benefit (N.J.S.A. 30:4-24.3). The HIPAA privacy rule allows disclosure where the patient is present or otherwise available prior to the disclosure, and agrees or, when given the opportunity, does

not object to the disclosure. Further, relevant information may be shared with family or friends if the provider can reasonably infer, based on professional judgment, that the consumer does not object. Finally, even where the consumer is not present or it is impracticable to ascertain because of emergency circumstances or the consumer's incapacity to ask for consent, a provider may share protected information with family or friends when, in exercising his or her best professional judgment, the provider determines that doing so would be in the best interests of the consumer. (U.S. Department of Human Services, HIPAA Frequent Questions, <http://www.hhs.gov/hipaafaq/notice/488.html>).

#### Social Impact

The proposed amendments are expected to positively impact consumers because the regulations will help to ensure that the recovery planning process is fully and accurately informed, yet respectful of consumers' rights to confidentiality. Families and close personal friends of consumers will benefit from these proposed amendments, which will facilitate a more meaningful role for them in the recovery planning process. Providers will benefit because the proposed amendments will only serve to make these requirements more clear and complete, reducing confusion and inefficiency in providers agencies' operations.

#### Economic Impact

The proposed amendments are not expected to increase providers' compliance cost. The proposed amendments will not impose an economic burden that is significantly different than it was in the past. Rather, the proposed amendments will only to serve to make these requirements more clear and complete, reducing confusion and inefficiency in providers agencies' operations. As in the past, the Department believes that provider agencies can comply with the rules without expenditures in addition to the funding received from the Division and other sources to provide these services. The promulgation of these standards is not intended or expected to impact the amount of Division funding available to provide these services in the future.

The funding of and the establishment of standards for the services which are subject to these rules have a positive economic impact on service recipients with limited incomes because the services are generally made available to them at no cost. The Department also believes that New Jersey taxpayers benefit from the effective delivery of these services because the services reduce the need for much more expensive psychiatric hospitalizations.

#### Federal Standards Statement

The proposed amendments set forth guidelines for the disclosure of protected health information to a consumer's family members and close personal friends during the service planning process. The preconditions delineated for

such disclosure are consistent with those required by Federal law, – specifically, the HIPAA privacy rule, 45 CFR 164.510(b). Therefore, the proposed amendments do not establish standards more stringent than those applicable under Federal law. Both N.J.A.C. 10:37F-2.4(b)4 and 45 CFR 164.510(b) allow information to be disclosed to families and friends where the consumer is present at the time of disclosure or otherwise available prior to disclosure and agrees or does not express an objection to the disclosure, the provider, using best professional judgment, reasonable infers that the consumer does not object. For greater clarity, the State standard elaborates further that absent countervailing circumstances, the consumer's agreement to participate in the service planning milestone with the family member or friend present indicates that the consumer does not object to disclosure of protected health information that is directly relevant to the family member's or close personal friend's involvement with his or her care (N.J.A.C. 10:37F-2.4(b)4ii(3)). Therefore, a Federal standards analysis is not required.

#### Jobs Impact

The proposed amendments are not expected to create jobs or cause loss of jobs in the community or with the State, since there is no change in scope, eligibility for, or duration of, mental health rehabilitation services, nor is there any change in provider qualifications.

#### Agriculture Industry Impact



The proposed amendments are not expected to have an impact on the agriculture industry in New Jersey.

#### Regulatory Flexibility Analysis

Some agencies providing partial care services may be small businesses, as that term is defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The proposed amendments set forth recordkeeping and compliance requirements necessary for the efficient operation of the program and to ensure a balance respecting the values of a consumer's right to confidentiality, the concern for and role of family members and close personal friends in the consumer's recovery, and the clinical need for complete information in treatment planning. The proposed amendments require providers to seek a valid written authorization from consumers prior to disclosing protected health information to family and friends (N.J.A.C. 10:37F-2.4(b)4i) and set forth preconditions for doing so in the absence of such an authorization (N.J.A.C. 10:37F-2.4(b)4ii and iii). Where protected health information is disclosed without a valid written authorization but in accordance with the conditions set forth at N.J.A.C. 10:37F-2.4(b)4ii or iii, the provider must document the basis for disclosure (N.J.A.C. 10:37F-2.4(c)).

Compliance with these provisions would not require the procurement of outside professional services, nor would providers need to expend capital costs to comply with these rules, as discussed in the Economic Impact, above. The proposed amendments focus on the requirements necessary to safeguard

consumers' confidentiality rights, while allowing for concerned and informed family members and friends to participate in recovery planning and decision-making.

The recordkeeping and compliance requirements imposed upon provider agencies must be uniformly applied, regardless of the size of the provider agency to ensure that individuals with mental illness receiving these services throughout the State do so with the assurance of basic minimum standards of quality.

#### Smart Growth Impact

The Department anticipates that the proposed amendments will have no impact on smart growth in New Jersey or in the implementation of the New Jersey State Development and Redevelopment Plan.

Full text of the proposal follows (additions indicated in boldface thus: deletions indicated in brackets [thus]):

## SUBCHAPTER 2. PARTIAL CARE STANDARDS

### 10:37F-2.4 Recovery planning

(a) (No change.)

(b) The IRP, developed with the consumer, shall include the following:

1. – 3. (No change.)

4. To assure family participation in developing the IRP and revisions, the PA shall seek the input of family members or close personal friends at each service planning milestone[, provided that the consumer has given written consent to release information related to the treatment or his or her mental illness]; however, the PA may not disclose protected health information to family members or close personal friends, except as follows:

- i. Protected health information may be disclosed to the extent permitted by a valid written authorization;
- ii. If the consumer is present at the service planning milestone, or otherwise available prior to, protected health information may be disclosed at that meeting if it is directly relevant to the family member's or close personal friend's involvement with the consumer's care and one of the following apply:

(1) The consumer agrees to disclosure of the information at the time of service planning milestone;

- (2) The consumer is provided with an opportunity to object to the disclosure at the service planning milestone and does not express an objection; or
- (3) Based on the exercise of professional judgment, the PA reasonably infers from the circumstances at the service planning milestone that the consumer does not object to the disclosure. Absent countervailing circumstances, the consumer's agreement to participate in the service planning milestone with the family member or close personal friend present indicates that the consumer does not object to disclosure of protected health information that is directly relevant to the family member's or close personal friend's involvement with his or her care; or

iii. If the opportunity to agree or object to the use or disclosure cannot practicably be provided because of the individual's incapacity or an emergency circumstance, the PA may, in the exercise of his or her professional judgment, determine whether the disclosure is in the best interests of the individual and, if so, disclose only the protected health information that is directly relevant to the person's involvement with the individual's health care;

5. – 8. (No change.)

(c) Where protected health information is disclosed pursuant to (b)4ii or iii above, the PA shall document the basis for the disclosure. Disclosure in accordance with (b)4ii or iii above shall not authorize or otherwise provide a basis for future disclosures not in compliance with this section.

Recodify existing (c) through (g) as (d) through (h). (No change in text.)